IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CP No. 129 of 2006
Date of Decision: 28.9.2006

In the matter of

Pasupati Spinning & Weaving Mills Limited, a company incorporated under the provisions of the Companies Act, 1956;

And

Pasupati Spinning and Weaving Mills Limited.

....Petitioner

Versus

Industrial Finance Corporation of India and others

....Respondents

Coram: Hon'ble Mr. Justice Hemant Gupta.

Present: Ms. Preeti Marwaha, Advocate, and
Shri Girish Agnihotri, Advocate, for the petitioner.

JUDGMENT

The petitioner is a Company incorporated under the Companies Act, 1956 (hereinafter referred to as `the Act') in August, 1979 having its registered office in village Kaprivas, Dharuhera, District Rewari, Haryana. The authorised capital of the petitioner-Company is Rs.1210 lacs divided into 121,00,000 equity shares of Rs.10 each and the total issued and paid up share capital is Rs.570.65 lacs divided into 5556505 equity shares of Rs.10 each and 1500000 equity partly paid up shares of Rs.1 each.

As a result of continuous losses incurred from the Financial Year 2000-01 onwards, the net worth of the Company had completely eroded as on 31.3.2002 and accordingly, the Company had filed a reference

under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as `the SICA'). The Board for Industrial and Financial Reconstruction (for short `BIFR') registered the same as BIFR Case No. 194/2002. The BIFR vide its order dated 14.7.2005 declared the Company as a sick industrial company under Section 3(1)(o) of SICA and appointed Bank of Baroda as the Operating Agencies under Section 17(3) of SICA to prepare a rehabilitation scheme for the revival of the Company. The said reference is pending before BIFR awaiting rehabilitation scheme.

In the present petition filed under Sections 391 to 394 of the Act, the prayer is for grant of permission to convene a meeting of the existing first charge holders of the petitioner for considering and approving the scheme of arrangement between the petitioner and its existing first charge holders. The principal amount due and payable in respect of the existing first charge holders is to the extent of Rs. 9847.76 lacs as on 31.3.2006. It is the case of the petitioner that 76% of the first charge holders of value amounting to Rs.7491.58 lacs, have settled their claim with the petitioner and the remaining creditors of value Rs.2356.88 lacs is required to be settled in respect of which, the petitioner has come out with the scheme containing two options. It is the case of the petitioner that except working capital bankers, whose accounts are regular with the Company, the arrangement is to settle the existing loans of the Company qua the first charge holders alone.

The petitioner has referred to the order dated 14.7.2005 passed by the BIFR in case No. 194/2002. A perusal of the said order shows that the representatives of the few financial institutions were in favour of the

petitioner being declared sick under the provisions of SICA, whereas the representatives of some other financial institutions have certain reservations about the Company being declared sick. The operative part of the order passed by the BIFR on 14.7.2005 read as under:-

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> Having considered the submissions made at today's hearing and the material facts on record, the Bench declared the Company sick under Section 3(1)(o) of the the Act and appointed BOB as the Operating Agency (OA) u/s 17(3) of the Act to prepare a rehabilitation scheme for the company taking the cut off date as 30.9.2005. The OA and the Company should keep in view the guidelines annexed in this regard."

The question is whether the present petition to convene a meeting of the first charge holders to consider the scheme of arrangement would be maintainable before this Court in terms of Sections 391 to 394 of the Act in view of the fact that the BIFR under the SICA has appointed an Operating Agency to prepare a rehabilitation scheme.

Learned counsel for the petitioner-Company has relied upon **National Organic Chemical Industries Ltd. and others v. Nocil Employees Union 2005(126) COM Cas 922 (BOM)** and **Re: Pharmaceutical Products of India Ltd. 2006(131) Com Cas 747 (BOM)**, to contend that this Court has the jurisdiction to convene the meeting of first charge holders to consider the scheme of arrangement and that the said scheme is in no-way inconsistent with the the rehabilitation scheme, which is being considered by the BIFR. Therefore, this Court has the jurisdiction to direct the meeting of the first charge holders to consider the scheme prepared by the petitioner.

At this stage reproduction of certain provisions of the SICA and the Act, would be relevant, which are as under:-

> **"17. Powers of Board to make suitable order on the completion of inquiry**.—(1) If after making an inquiry under Section 16, the Board is satisfied that a company has become a sick industrial company, the Board shall, after considering all the relevant facts and circumstances of the case, decide, as soon as may be by order in writing, whether it is practicable for the company to make its net worth exceed the accumulated losses within a reasonable time.
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> (2) If the Board decides under sub-section (1) that it is practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time, the Board, shall, by order in writing and subject to such restrictions or conditions as may be specified in the order, give such time to the company as it may deem fit to make its net worth exceed the accumulated losses,
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> (3) If the Board decides under sub-section (1) that it is not practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time and that it is necessary or expedient in the public interest to adopt all or any of the measures specified in Section 18 in relation to the said company it may, as soon as may be, by order in writing, direct any operating agency specified in the order to prepare, having regard to such guidelines as may be specified in the order, a scheme providing for such measures in relation to such company.
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> **18. Preparation and sanction of schemes**.—(1) Where an order is made under sub-section (3) of Section 17 in relation to any sick industrial company, the operating agency specified in the order shall prepare, as expeditiously as possible and ordinarily within a period of ninety days from the date of such order, a scheme with respect to such company providing for

any one or more of the following measures, namely:—

(*a*) the financial reconstruction of the sick industrial company;

(*b*) the proper management of the sick industrial company by change in, or take over of, management of the sick industrial company;

(*c*) the amalgamation of—

(*i*) the sick industrial company with any other company; or

(*ii*) any other company with the sick industrial company;

(hereafter in this section, in the case of sub-clause (*i*), the other company, and in the case of sub-clause (*ii*), the sick industrial company, referred to as "transferee company");

(*d*) the sale or lease of a part or whole of any industrial undertaking of the sick industrial company;

(*da*) the rationalisation of managerial personnel, supervisory staff and workmen in accordance with law;

(*e*) such other preventive, ameliorative and remedial measures as may be appropriate;

(*f*) such incidental, consequential or supplemental measures as may be necessary or expedient in connection with or for the purposes of the measures specified in clauses (*a*) to (*e*).

(2) xx xx xx

19. Rehabilitation by giving financial assistance.—(1) Where the scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, the scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority (any Government, bank, institution or other authority required by a scheme to provide for such financial assistance being hereafter in this section referred to as the person required by the

scheme to provide financial assistance) to the sick industrial company.

(2) Every scheme referred to in sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation or within such further period, not exceeding sixty days, as may be allowed by the Board, and if no consent is received within such period or further period, it shall be deemed that consent has been given.

(3) Where in respect of any scheme the consent referred to in sub-section (2) is given by every person required by the scheme to provide financial assistance, the Board may, as soon as may be, sanction the scheme and on and from the date of such sanction the scheme shall be binding on all concerned.

(3-A) On the sanction of the scheme under sub-section (3), the financial institutions and the banks required to provide financial assistance shall designate by mutual agreement a financial institution and a bank from amongst themselves which shall be responsible to disburse financial assistance by way of loans or advances or guarantees or reliefs or concessions or sacrifices agreed to be provided or granted under the scheme on behalf of all financial institutions and banks concerned.

(3-B) The financial institution and the bank designated under sub-section (3-A) shall forthwith proceed to release the financial assistance to the sick industrial company in fulfilment of the requirement in this regard.

(4) Where in respect of any scheme consent under sub-section (2) is not given by any person required by the scheme to provide financial assistance, the Board may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit.

32. Effect of the Act on other laws.—(1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign

Exchange Regulation Act, 1973 (46 of 1973), and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976), for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act."

On the other hand, the provisions of Section 391 of the Act, contemplating arrangement with creditors read as under:-

"Section 391. Power to compromise or make arrangements with creditors and members.- (1) Where a compromise or arrangement is proposed-

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them;

the court may, on the application of the company or of any creditor or member of the company or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be to be called, held and conducted in such manner as the court directs.

(2) If a majority in number representing three-fourths of in value of the creditors, or class of creditors, or members, or class of members as the case may be, present and voting either in person or, where proxies are allowed under the rules made under section 643, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributories of the company;

xx xx xx"

In **Nocil Employees Union's case (supra),** the learned single

Judge of Bombay High Court has held that the provisions of both the statutes i.e. Sections 391 and 394 of the Act as well as that of Sections 15 to 19 of SICA, are supplemental to each other and not inconsistent therewith and therefore, the Company Court would have the power to sanction the scheme under Sections 391 and 394 of the Act, irrespective of the provisions of Section 31 of the SICA. It was, inter-alia, held to the following effect:-

> ".....The provisions of Sections 15 to 19 of the Act is a scheme where a company which has become sick can register itself with the BIFR which is vested with the power under the provisions of the said Act which shall thereafter after making enquiry may provide for package for rehabilitation of the company and/or make the company viable so that the business of the company can continue. The provisions of Sections 391 to 394 of the Companies Act, 1956, also similarly provide for arrangement of the company's business by way of granting amalgamation, demerger and/or by sanctioning of the scheme of compromise which also has the very same purpose and object to revive and/or make the company more viable and efficient. The provisions of the Act though provide for different methods of doing so, they are not inconsistent with each other."

In **Pharmaceutical Products of India Ltd's case**, the learned Single Judge of the Bombay High Court has relied upon the earlier judgment rendered in **Nocil Employees Union's case (supra)** and held that the provisions of SICA shall prevail over the provisions of the Act in case of any inconsistency in a given subject, but it was found that the purpose of the proposed scheme of arrangement is to revive and infuse fund in the Company which approach will be consistent with the object of SICA. It was, inter-alia, held to the following effect:-

> ".....If it was sanction of a scheme simplicitor under Section 18 of the Act undoubtedly by virtue of Sub-section (8) of Section 18 of the Act of 1985, the directions given by the forum under the provisions of the Act of 1985 would not only bind the sick industrial company and the transferee company but also other companies as also shareholders, creditors, guarantors and employees of the said company. However, as specified secured creditors qualify the description of banks and financial institutions referred to in Section 19(1) of the SICA, the matter will have to be viewed from different perspective. That is to because, Section 19(4) makes it amply clear that if consent or the scheme is not given by any one of the persons required to give such consent to the scheme, to provide financial assistance, the Board will have to adopt such measures including winding up of a sick industrial company. *In other words, even if one bank or financial institution was to withhold the consent, rehabilitation of a sick industrial company by giving financial assistance will be ruled out. On the other hand the proposed scheme, even if opposed by such banks or financial institutions, can be sanctioned by this Court and in that event the direction given by this Court in exercise of powers under Section 391 of the Companies Act will bind the non-consenting bank and financial institutions as well. (Emphasis supplied).* In such a case drastic order of winding up of the sick industrial company will not be resorted to. Viewed in this perspective the petitioner-company may be justified in contending that the remedy under Section 391, as is invoked by the petitioner is the proper remedy and directions passed in the said proceedings by this Court will be in no way inconsistent with the scheme or the provisions of the SICA."

No doubt, the said observations of the Bombay High Court, support the contentions raised by the learned counsel for the petitioner but I have my reservations to accept the said reasoning. A Division Bench of Karnataka High Court in **BPL Limited v. Inder Modal Transport**

Technology Systems (Karnataka) Ltd. and others 2001(107) Com Cas 31, has considered the scope of Company Court in a matter of sale of assets by the BIFR under the provisions of SICA. It has been held that BIFR retains absolute control over the affairs of the Company from the date of commencement of inquiry in regard to any reference received under Section 15 of the SICA, till the passing of an order of winding up by the High Court under Section 20(2) of the SICA. The relevant observation reads as under:-

> "The scheme of the SICS Act, as contained in Sections 22, 22A, 20 and 32 of that Act, makes it clear that from the date of commencement of an inquiry in regard to any reference received under section15, till the passing of an order of winding up by the High Court under section 20(2) of the SICS Act, the BIFR retains absolute control over the affairs of the company and can either prevent any sale or permit any sale and the sick industrial company is entirely governed by the provisions of the SICS Act. On the other hand, once an order of winding up is made by the High Court under section 20(2) of the SICS Act, acting on the opinion of the BIFR under section20(1), the control of and jurisdiction over the company, its affairs and assets pass over to the High Court and the BIFR ceases to have any power to pass any orders or give any directions."

The said judgment has been quoted with approval by the Hon'ble Supreme Court in **NGEF Ltd. v. Chandra Developers (P) Ltd. and another (2005)8 Supreme Court Cases 219.** In the said case the Hon'ble Supreme Court has examined the role of BIFR under the SICA as well as that of the Company Court under the Act. That was a case, where the BIFR has recommended the winding up of the Company in question but in respect of sale of its assets, the BIFR passed an order that the Company would have to seek appropriate directions from the High Court concerned. While considering the various issues involved in the said case, the argument

raised therein that both Company Court and the BIFR exercise concurrent jurisdiction, did not find favour with the Hon'ble Supreme Court. It was held that the provisions of SICA will prevail over the provisions of the Act as SICA was enacted subsequent to the provisions of the Act. Therefore, it is not possible to accept the submission that the High Court exercises concurrent jurisdiction. It was held to the following effect:-

> "41. It is difficult to accept the submission of the learned counsel appearing on behalf of the respondents that both the Company Court and BIFR exercise concurrent jurisdiction. If such a construction is upheld, there shall be chaos and confusion. A company declared to be sick in terms of the provisions of SICA, continues to be sick unless it is directed to be wound up. Till the company remains a sick company having regard to the provisions of sub-section (4) of Section 20, BIFR alone shall have jurisdiction as regards sale of its assets till an order of winding up is passed by a Company Court.
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> 44. SICA was furthermore enacted subsequent to the provisions of the Companies Act. It is not, thus, possible to accept the submission that the High Court exercises a concurrent jurisdiction."

It was further held that Section 32 of SICA contains a non obstante clause which is to the effect that the provisions thereof or any rules or Schemes made thereunder shall have effect notwithstanding anything inconsistent in any other law for the time being in force. It was held that Company Judge may have the jurisdiction to pass an interim order in exercise of its inherent jurisdiction or otherwise directing execution of a deed of sale in favour of the applicant by the Company sought to be wound up, but keeping in view the express provisions contained in sub-section (4) of 20 of SICA, such a power in the Company Judge is not available in

respect of a Company which is before BIFR. It was held to the following effect:-

> "49. Section 32 of the SICA contains a non obstante clause stating that provisions thereof shall prevail notwithstanding anything inconsistent with the provisions of the said Act and of any rules or schemes made thereunder contained in any other law for the time being in force. It would bear repetition to state that in the ordinary course although the Company Judge may have the jurisdiction to pass an interim order in exercise of its inherent jurisdiction or otherwise directing execution of a deed of sale in favour of an applicant by the Company sought to be wound up, but keeping in view the express provisions contained in sub-section (4) of Section 20 of SICA such a power, in our opinion, in the Company Judge is not available."

In the present case, the BIFR under Section 17(3) of the SICA has appointed an Operating Agency to prepare a scheme for providing such measures in relation to the petitioner Company so as to make its net worth exceed the accumulated losses within a reasonable time. Section 18 of the Act deals with the preparation and sanction of the schemes which, inter-alia, provide for such preventive, ameliorative and remedial measures as may be appropriate to achieve the said purpose. Section 19 of the SICA contemplates that where the scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, the scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, State Government, Scheduled Bank or other Bank or a public financial institution etc. Therefore, the scheme of arrangement proposed by the petitioner to defer the payment due to the first charge holders is required to be framed by the operating agency, in terms of Section 18 read with

Section 19(1) of SICA. Section 19(4) of SICA contemplates that if in respect of any such scheme consent is not given by any person required to provide financial assistance, the BIFR may adopt such other measures including the winding up of the Industrial Company. Therefore, the scheme of arrangement proposed by the petitioner also falls within the scope of scheme, which is under preparation by the Operating Agency in terms of the aforesaid provisions. Since Section 19(4) of SICA contemplates that if consent under sub-section (2) is not given by any person required by the scheme to provide financial assistance, the Board may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit, therefore, the provisions of the said Act are inconsistent with the provisions of Section 391 of the Companies Act, wherein it is contemplated that if 3/4th majority of the class of creditors approve the scheme, it is binding on all the creditors of that category. Since the provisions of SICA are to prevail upon the provisions of the Act in case of inconsistency in terms of Section 32 of the Act, therefore, I am of the opinion that the meeting of first charge holders cannot be directed to be convened till such time, the matter is pending before the BIFR and the operating agency is considering the preparation of a scheme under SICA.

In **Pharmaceutical Products of India Ltd's case (supra),** the Bombay High Court has noticed the inconsistency but found that the scheme can be sanctioned under Section 391 of the Act. In my view since Section 32 of SICA unambiguously contemplates that provisions of the Act, rules or "the scheme" if inconsistent with any other law, shall prevail over any other law, therefore, it is premature for the petitioner to seek the meeting of the first charge holders as the BIFR is still seized of the matter.

With due deference, I am unable to subscribe that the Company Court will continue to have jurisdiction even when the scheme of rehabilitation is under preparation by the Operating Agency in terms of the order passed by the BIFR. Therefore, I am not inclined to convene the meeting of the first charge holders for considering the scheme of arrangement till such time the matter is pending before the BIFR.

Consequently, the present petition is dismissed at this stage.

September 28, 2006 **(HEMANT GUPTA)**
ds **JUDGE**